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No. 99-1152

Supreme Court, U.S.
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In the

Supreme Court of the United States

THE HOPE CLINIC,
Marilynn Connors Fredriksen, M.D.,
Norman A. Ginsberg, M.D., Cassing Hammond, M.D.,
Lauren Streicher, M.D., and David Zbaraz, M.D.,

Petitioners,

v.

JAMES E. RYAN, Attorney General
of the State of Illinois, in his official capacity;
and Richard Devine, State's Attorney
of Cook County, Illinois, in his official capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MEMORANDUM OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Illinois Partial-Birth Abortion Ban Act ("the Act") would unduly burden a woman's right to an abortion, and whether the Seventh Circuit correctly held that it would not because it could be construed by state courts to ban only the "dilation and extraction" ("D&X") procedure and not other more commonly-used abortion procedures.

2. Whether the absence of a health exception in the Act would place an undue burden on a woman's right to an abortion in light of uncontradicted evidence that the D&X procedure is never the only appropriate, *i.e.* medically safe, procedure available and in the absence of any claim in the district court record that petitioners had ever performed the D&X procedure or desired to do so.

3. Whether the Act is unconstitutionally vague, and whether the Seventh Circuit correctly held that it is not because it could be construed by state courts (1) to incorporate the medical definition of the D&X procedure, or (2) to include a requirement that the state prove knowledge of the law's application to the challenged medical procedure, and because it could be applied to procedures that came within the "core meaning" of its definition, namely the D&X procedure, while its application to other procedures was determined in state court.

4. Whether the Seventh Circuit properly directed the entry of "precautionary injunctions" designed to confine enforcement of the Act to the D&X procedure while permitting supplemental construction of the Act through state court litigation or further state legislation.

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REASONS FOR GRANTING THE PETITION

REVIEW SHOULD BE GRANTED BECAUSE THE OPPORTUNITY TO CONSIDER DIFFERING STATUTES REGULATING PARTIAL-BIRTH ABORTION PROCEDURES AND DIFFERING FACTUAL RECORDS WILL MATERIALLY ASSIST THE COURT IN RESOLVING THE VALIDITY OF WIDELY-ENACTED STATUTES DEALING WITH AN ISSUE OF GREAT PUBLIC INTEREST.

Respondents agree with Petitioner that the Court should grant a writ of certiorari in the instant case. Respondents take this position mindful that the Court has granted review in a case involving a partial-birth abortion statute enacted by the State of Nebraska. *Stenberg v. Carhart*, No. 99-830 (review granted January 14, 2000). Indeed, consideration of the instant case in conjunction with *Carhart* will materially assist the Court in resolving the validity of partial-birth abortion bans throughout the country by permitting the court to examine differing models of regulation of partial-birth abortion procedures used by various states and different factual records. Accordingly Respondents request that the Court grant the petition and set the case for expedited briefing and for argument in conjunction with the Nebraska case.[1]

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[1] Counsel of record for Respondents has conferred with counsel of record for Petitioners regarding scheduling in the event the Court grants the writ in the instant case. Counsel for Petitioners indicated that, should the writ be granted, she would not object to an expedited briefing schedule that would permit this case to be heard and considered along with the Nebraska case. Respondents similarly do not object, and will so move immediately should the Court grant the instant petition.

Review is warranted in this matter because of significant differences between the Nebraska case and the instant case, both as to the underlying statutes and the opinions of the respective Courts of Appeals. These differences amount to more than simply a conflict between the two circuits. Moreover, as noted in the Petition, these statutes have prompted substantial federal court litigation and, as they involve abortion regulation, concern matters of the greatest public interest.

The Nebraska statute under review in *Stenberg v. Carhart* defines the banned "partial-birth abortion" as one in which the person performing the abortion "partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." Neb. Rev. Stat. §28-326(9). The statute goes on to define "partially delivers vaginally a living unborn child as"

> deliberately and intentionally delivering into the vagina a living unborn child, *or a substantial portion thereof*, for the purpose of performing a procedure that the person performing such a procedure knows will kill the unborn child and does kill the unborn child.

Id. (emphasis added). The result of this language is to define "unborn child" to include a "substantial portion" of an unborn child. The analogous definition in the Illinois partial-birth abortion ban is different in that respect; it refers to "partially vaginally deliver[ing] a living human fetus or infant" and notes that those terms "are used interchangeably to refer to the biological offspring of human parents," 720 ILCS §513/5, but does not contain the "substantial portion" language included in the Nebraska statute. Similarly, the Wis-

consin statute, also reviewed by the Seventh Circuit, refers to a "living child" and a "partially delivered child", Wis. Stat. §940.16(1), but contains no reference to a portion of such a child. By granting the writ in the instant case, then, the Court will place itself in a position to examine two different methods by which states have sought to regulate partial-birth abortions.

Consideration of both types of statute will serve the Court well in determining the authority of legislatures to regulate partial-birth procedures. Of the 30 states that have enacted such statutes, ten (including Nebraska) have done so using "substantial portion" language,[2] while 14 in total have used language similar to that of Illinois and Wisconsin.[3] Moreover, the "substantial portion" language was viewed by the Eighth Circuit as

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[2] *See*, in addition to the Nebraska statute cited above, Iowa Code § 707.8A(1) (1998); Ky. Rev. Stat. §§ 311.595 (3), 311.720, 311.990 (11) (Michie 1998); N.J. Stat. Ann. §§ 2A:65A-5 to -7 (West 1997); Okla. Stat. tit. 21, § 684 (1998); R.I. Gen. Laws §§ 23-4.12.1, 23-4.12.2, 23-4.12-3, 23-4.12-4 (1998); Tenn. Code Ann. § 39-15-209 (1997); Va. Code Ann. § 18.2-74.2 (Michie 1998); W. Va. Code §§ 33-42-3, 33-42-8 (1998); Idaho Code § 18-613 (1998).

[3] *See*, in addition to the Illinois and Wisconsin statutes, Ala. Code §§ 26-23-1-1, 26-23-3 to 26-23-4 (1998); Alaska Stat. § 18.16.050 (Michie 1998); Ariz. Rev. Stat. Ann. 13.3603.01 (West 1997); Ark. Code Ann. §§ 5-61-201 to 5-61-203 (Michie 1997); Fla. Stat. Ann. §§ 390.11, 390.0111 (West 1998); Ga. Code Ann. § 16-12-144 (1998); Ind. Code Ann. §§ 16-18-2-267.5, 16-34-2-1 (b), 16-34-2-7(d) (Michie 1998); Miss. Code Ann. §§ 411-41-71, 411-41-73 (1998); Missouri Senate Substitute No. 3 for House Bills Nos. 427, 40, 196 and 404 (1999), to be codified at Mo. Rev. Stat. § 565.300 *et seq.*; S.C. Code Ann. §§ 44-41-85(F) (Law Co-op 1997); S.D. Codified Laws §§ 34-23A, 34-23A-32 (Michie 1998); Kansas Stat. Ann. §65-6721 (1998).

"crucial" to its holding in the Nebraska case that the statute would be read to extend to the commonly-used dilation and extraction ("D&E") procedure. *Carhart v. Stenberg*, 192 F.3d 1142, 1150 (8th Cir. 1999), *cert. granted*, *Stenberg v. Carhart*, No. 99-830 (January 14, 2000). Review of cases that present both types of statutes will present the Court with the opportunity to determine, for all of the interested states, whether such language is in fact critical to the validity of a partial-birth abortion regulation.

In addition to the opportunity to consider differing statutory texts, review of both the Seventh and Eighth Circuit's opinions would present the Court with greatly differing methods of construing partial-birth abortion statutes. In contrast to the Eighth Circuit's simplistic construction of the Nebraska statute in *Carhart*, 192 F.3d at 1150, the Seventh Circuit made a considerable effort to construe these statutes in a manner that permitted them to be upheld and a preference for permitting state courts to offer construction of the statutes consistent with the exercise of constitutionally-protected abortion rights. *Hope Clinic v. Ryan*, 195 F.3d 857, 861 (7th Cir. 1999); Pet. App. 2 ("We conclude that both laws *can* be applied in a constitutional manner. *Whether* that will occur depends on state courts, which alone can settle questions about the construction of the statutes.") (emphasis in original). The court in fact offered three methods of construing the statutes that enabled it to conclude that it posed no threat to physicians seeking to perform the commonly-used D&E abortion procedure, or indeed any other recognized abortion procedure, and thus to turn aside the vagueness and "undue burden" challenges advanced by Petitioners. Initially, the court read both statutes as confined to the

D&X procedure, the concern that had in fact animated the passage of legislation in Illinois and Wisconsin. *Id.* at 865-66; Pet. App. 11-14. The court applied these constructions with regard to both Petitioners' vagueness claim and their claim that the statutes unduly burdened abortion rights. *Id.* at 866, 871; Pet. App. 13, 23. The Seventh Circuit further observed that state courts construing these statutes might elect to apply the statutes to their "central core of meaning" (again the D&X procedure) while permitting the "outer boundaries" of the statute to be determined through subsequent litigation. *Id.* at 867; Pet. App. 16. To assure the opportunity for such construction, the court directed the district courts in Illinois and Wisconsin to enter precautionary injunctions barring application of the statutes to cases involving D&E abortions or other methods until additional clarification was provided by the respective states through their legislatures or courts. *Id.* at 868; Pet. App. 18-19. Even a brief comparison of the two opinions demonstrates that the Court would again be well served by having the opportunity to examine these highly different methods of statutory construction as applied to statutes dealing with similar subject matter.

Similarly, joint review would provide the Court with the opportunity to consider cases with differing factual records, ranging from the affidavits filed by Petitioners in the Illinois case, to the preliminary injunction hearing held in the Nebraska case, and on to the preliminary and permanent injunction trials held in the district court in Wisconsin. These records could be usefully compared, especially in light of the Seventh Circuit's discussion of the deference if felt was due to the "factual premises" considered by the legislatures in passing

the Illinois and Wisconsin statutes. *See Hope Clinic*, 195 F.3d at 872-73; Pet. App. 25-26.

Finally, contemporaneous review of the Seventh and Eight Circuits' opinions would be consistent with the Court's practice on a number of other occasions in which abortion regulations have been challenged. Indeed, while it has not universally followed this practice, the Court has often jointly heard and decided two and even three abortion cases, especially when dealing with similar kinds of regulations.[4] Although some of these earlier cases may have been heard as a result of direct appeals to the Court of a type no longer permitted, in each instance the Court benefitted from the ability to consider the variations among statutes, lower court analyses and records in fully airing the issues the Court had before it. Hearing and considering the instant case in conjunction with that arising in Nebraska would be similarly helpful to the Court in its complete and critical consideration of whether, and to what extent, states can regulate partial-birth abortion procedures.

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[4] *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), *Singleton v. Wulff*, 428 U.S. 106 (1976) and *Bellotti v. Baird*, 428 U.S. 132 (1976); *Beal v. Doe*, 432 U.S. 438 (1977), *Maher v. Roe*, 432 U.S. 464 (1977), and *Poelker v. Doe*, 432 U.S. 519 (1977); *Harris v. McRae*, 448 U.S. 297 (1980), and *Williams v. Zbaraz*, 448 U.S. 358 (1980); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476 (1983), and *Simopolous v. Virginia*, 462 U.S. 506 (1983); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 402 (1990), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *cf. Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Vacco v. Quill*, 521 U.S. 793 (1997) ("right to die" cases).

CONCLUSION

The petition for writ of certiorari should be granted, and the case should be scheduled to permit it to be heard by the Court in conjunction with *Stenberg v. Carhart*, No. 99-830.

Respectfully submitted,

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